Commonwealth of Kentucky
Supreme Court

Case No. 2014-SC-000241-DR

JONATHAN MCDANIEL — APPELLANT

v.

Appeal from Calloway Circuit Court
Hon. Dennis R. Foust, Chief Judge
Indictment No. 2009-CR-00181

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR COMMONWEALTH

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief for the Commonwealth was mailed 1st class U.S. mail, postage prepaid this the 10th day of August, 2015, to: Hon. Dennis R. Foust, Judge, Chief Circuit Judge, Marshall Circuit & District Courts, 80 Judicial Drive ,Unit 215, Benton, KY 42025; via state-messenger mail to: Hon. Meredith Krause, Assistant Public Advocate, Department of Public Advocacy, Suite 501, 200 Fair Oaks Lane, Frankfort, Kentucky 40601; and by agreement via electronic mail to Hon. Mark Blankenship, Commonwealth Attorney, 304 North Fifth Street, P.O. Box 1488, Murray, KY 42071.I further certify that the record on appeal was returned to the Clerk of this Court on the same day.

CHRISTIAN K. R. MILLER
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INTRODUCTION

Jonathan McDaniel entered a guilty plea to a sex crime and later filed a Motion to Amend his sentence, which was denied and appealed. Following the Court of Appeals's affirmance of that denial, McDaniel sought and was granted discretionary review on two issues.

ORAL ARGUMENT STATEMENT

The Commonwealth does not request oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

APPENDIX

COUNTERSTATEMENT OF THE CASE

On December 17, 2009, the Calloway County Grand Jury indicted Jonathan McDaniel of one count of First-Degree Sexual Abuse, Victim Under 12, for sexual contact that occurred on May 19, 2009. (TR 1).

On March 12, 2010, McDaniel accepted the Commonwealth's offer to serve six-years imprisonment in exchange for a guilty plea on the crime as charged, an allocution to the victim's family, and no contact with the victim or victim's family. (TR 29).

On May 10, 2010, McDaniel was finally sentenced according to the terms of the Commonwealth's offer. (VR 5/10/10, 9:52:00). McDaniel was informed by the trial court that he would serve a period of conditional discharge after his release. (*Id.* at 9:52:40). McDaniel's trial counsel and the Commonwealth corrected the trial court that he was subject to the five-year period instead of the three-year conditional discharge period. (*Ibid.*).

On May 23, 2012, McDaniel filed a "Motion to Amend" his sentence, arguing his conditional discharge was in violation of Due Process because a jury did not find him guilty of the enhanced sentence:

> There are a great number of cases in which said courts of superior jurisdiction have held that any enhancement to the statutory length of a sentence, such as this Conditional Discharge, must be presented in an indictment, tried by a jury, and the enhancement must be levied by the jury after finding guilt beyond a reasonable doubt. This is in keeping with the "due process clause" of the United States Constitution as enumerated in Amendment V and the jury trial guarantee of

Amendment VI, wherein the courts have decreed that ". . . any fact that increases the maximum penalty for a crime MUST (emphasis added) be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt. . ." .

Likewise, the U.S. Constitution, Amendment XIV, provides for the proscription of any deprivation of liberty without due process of law and Amendment VI guarantees that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. It has also been decreed that it is ". . . unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt. . .".

In the case of Apprendi v New Jersey, 120 SCt 2348, Justice Stephens of the U.S. Supreme Court held that Amendment XIV's due process clause has required all the foregoing constrictions.

The U.S. Supreme Court, in Apprendi supra, and Jones v. United States, 119 SCt 1215 has decreed that any enhancement beyond statutory limits must be included in an indictment, tried by a jury, and the enhanced punishment must be assigned by the jury.

The Kentucky Supreme Court, in Bailey v Commonwealth, 70 SW 3rd 414, states ". . . the trial judge does not have the discretion to alter the sentence of a defendant pleading guilty. . .".

Likewise, in Ladriere v Commonwealth, 2009 SC 758 MR virtually restates all of the foregoing. There are a vast number of cases in which the enhancements have been vacated due to constitutional constraints.

> Wherefore Movant moves this Honorable Court to vacate the Conditional Discharge portion of his sentence, per the decisions of Courts of Superior Jurisdiction.

(TR 49-50).

On June 15, 2012, the trial court entered an order denying the motion, stating in relevant part:

> The Calloway County Circuit Court accepted the guilty plea and on May 10, 2010, entered a final judgment and sentence finding the defendant guilty of Sexual Abuse, 1st Degree and sentencing him to a term of imprisonment of six (6) years in a state penal institution. In addition, in accordance with KRS 532.043, the defendant, having been convicted of an offense under KRS Chapter 510, was sentenced to a five (5) year period of conditional discharge.
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> On May 23, 2012, the defendant, *pro se*, filed with the Calloway County Circuit Clerk a Motion to Amend Sentence, arguing that the period of conditional discharge that will begin upon expiration of his sentence of incarceration or release from parole is unconstitutional as a violation of the due process guarantee of the 5th and 14th Amendments and the trial by jury guarantee of the 6th Amendment. The defendant claims the period of conditional discharge is an inappropriate enhancement of the sentence and the entire scheme of conditional discharge for sex offenses is unconstitutional.
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> DISCUSSION
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> I. Cases Cited by the Defendant
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> The defendant cites two cases from the Supreme Court of the United States to support his position, *Apprendi v. New Jersey* and *Jones v. United States*. Both of these cases address statutes that allow the trial court to make determinations of fact which

serve to enhance a sentence. The Court ruled that these determinations of fact, vested in the trial court alone by statute, violate the constitutional guarantees of due process of law and trial by jury. Any fact that enhances a sentence must be included in an indictment, tried by jury, and determined by the jury to have existed beyond a reasonable doubt.

These cases have no bearing on the instant case whatsoever, as there were no determinations of fact made by the trial court to determine whether the period of conditional discharge should or should not be instituted following the expiration of defendant's sentence or release from parole.

The defendant also cites *Bailey v. Commonwealth*, 70 S.W.3d 414 (Ky. 2002). In this case, the Commonwealth recommended a sentence of one (1) year in a state penal institution. Instead of following the recommendation, the trial court sentenced the defendant to twelve (12) months in the county jail. This was found to be an imposition of a sentence in reality more harsh than that agreed to through the plea agreement process since there would be no chance for parole, no opportunity to work and attend counseling programs, and the defendant would be locked in a cell most of the day instead of having some freedom to move about that a penal institution would afford.

Again, this case has no bearing on the instant case whatsoever as the trial court sentenced the defendant to a term of imprisonment that mirrored the recommendation made by the Commonwealth exactly. The imposition of the conditional discharge period was required by statute and imposed by the court in accordance with that statute. It is important to note that the defendant includes a quote as belonging to the decision in this case. However, this quote is not found anywhere in this decision.

Finally, the defendant cites *LaDriere v. Commonwealth*, 329 S.W.3d 278 (Ky. 2010). In this case, the defendant pleaded

guilty to Kidnapping and the trial court included the five (5) year period of conditional discharge in the sentence. However, the statute did not authorize imposition of the conditional discharge for Kidnapping and this portion of the sentence was vacated.

The defendant in the instant case pleaded guilty to a violation of KRS 510.110. The period of conditional discharge is mandated for all offenses arising under KRS Chapter 510. The defendant was properly sentenced to a period of conditional discharge following expiration of his sentence or release from parole.

II. Other Applicable Case Law

In *Smith v. Commonwealth*, 2010 WL 1005907 (Ky. 2010), the Supreme Court recognized the requirement of KRS 532.043 that a trial court sentence a defendant that qualifies to a term of conditional discharge to begin following expiration of sentence or release from parole. Page 7. Also, in *Wilfong v. Commonwealth*, 175 S.W.3d 84 (Ky. App. 2004), the Court of Appeals stated "since Wilfong pled guilty and was not sentenced by a jury, his request that this Court declare KRS 532.043 to be in violation of [the Truth in Sentencing Statute] and the constitutional guarantee of due process is wholly without merit." *Wilfong*, 175 S.W.3d at 94.

In this case, the Calloway County Circuit Court sentenced the defendant to a term of imprisonment the length of which mirrored the term recommended by the Commonwealth exactly and imposed a period of conditional discharge for five (5) years to begin upon expiration of this sentence of release from parole. The Supreme Court of Kentucky has recognized the existence of the conditional discharge period as required by statute. Further, the Kentucky Court of Appeals has held that a defendant pleading guilty, as the defendant in this case did, to an offense requiring the period of conditional discharge cannot assert that

> the conditional discharge is unconstitutional as a violation of the due process or trial by jury guarantees.
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> CONCLUSION
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> The defendant's arguments in his Motion to Amend Sentence are not adequately supported by case law as the cases cited by defendant are not on point with the arguments he attempts to make to the Court. The appellate courts of Kentucky have approved of the existence of the period of conditional discharge for certain offenses, though the existence of the statute establishing the conditional discharge period has never been challenged on a constitutional basis. Finally, because defendant pleaded guilty to this offense, aware that the sentence would include a period of conditional discharge following expiration of the sentence or release from parole, his challenge to that period is wholly without merit.

(TR 52-56).

McDaniel then timely filed a notice of appeal and motions to proceed *in forma pauperis* and to have counsel appointed on appeal. (TR 57-66). Those motions were granted and an appeal followed to the Court of Appeals.

On September 28, 2012, the Department of Public Advocacy filed a motion with the Court of Appeals to withdraw as counsel for McDaniel, stating:

> An attorney with the DPA has reviewed the record in this case and has determined that this "post-conviction proceeding . . . is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense." KRS 31.110(2)(c). Thus it appears that the Appellant has "no further right to be represented by counsel under the provisions of [the Public Advocacy Statutes." KRS 31.110(2)(c).

On October 24, 2012, the Court of Appeals denied the DPA's motion and ordered it to file briefs in three similar cases: *John Martin v. Commonwealth*, 2012-CA-1172-MR; *Jonathan McDaniel v. Commonwealth*, 2012-CA-1299-MR; and *David L. Deshields v. Commonwealth*, 12-CA-1513-MR.

McDaniel filed a brief that raised two issues: (1) was his plea made knowingly, intelligently, and voluntarily; and (2) did he suffer a Fair Warning violation when the legislature changed the revocation procedures for sex offender conditional discharges?

On April 4, 2014, the Court of Appeals issued one opinion on the three consolidated cases of *Martin, DeShields, and McDaniel*, affirming all three trial court opinions. Initially, in deciding what standard of review to utilize, the court held that the Motion to Amend Sentence was an RCr 11.42 motion. (Slip Op. at 3-4). The court rejected McDaniel's first claim, finding it was not properly before the court as it had never before been raised.

The court then addressed the conditional discharge "due process" claim, and found none had occurred. (Slip Op. at 4-6).

McDaniel then filed a motion for discretionary review with this Court. He raised two claims: (1) can the Court of Appeals construe an un-characterized "Motion to Amend Sentence" as an RCr 11.42 motion?; and (2) does a defendant suffer a Fair Warning violation when the legislature alters the revocation proceedings for a sex offender's conditional discharge?

This Court granted discretionary review on both issues.

Any additional facts are discussed as necessary below.

ARGUMENT

Two issues are raised on appeal. Both issues should be summarily denied as McDaniel's Motion to Amend Sentence was not ripe for review. Following the ripeness issue, the Commonwealth responds to McDaniel's claims.

I. The Motion to Amend Sentence was not ripe for review.

McDaniel's appeal is not properly before this Court because his motion raised an issue that was not ripe. Ripeness may be raised at any time, as it concerns the justiciability of a claim:

> The issue of ripeness has not been raised heretofore, but is an element of a justiciable motion or claim. "Questions that may never arise or are purely advisory or hypothetical do not establish a justiciable controversy. Because an unripe claim is not justiciable, the circuit court has no subject matter jurisdiction over it."

Nordike v. Nordike, 231 S.W.3d 733, 739-740 (Ky. 2007) (quoting *Doe v. Golden & Walters, PLLC,* 173 S.W.3d 260, 270 (Ky. App. 2005)). *See also W.B. v. Comm., Cabinet for Health and Family Services*, 388 S.W.3d 108 (Ky. 2012) (court can raise ripeness claim *sua sponte*).

Ripe claims require a live case or controversy, not a potential or hypothetical controversy. ". . . [T]he ripeness doctrine requires the judiciary to refrain from giving advisory opinions on hypothetical issues." *Associated*

Industries of Ky. v. Commonwealth, 912 S.W.2d 947, 951 (Ky. 1995) (citing *United States v. Fruehauf*, 365 U.S. 146 (1961)).

Here, McDaniel was serving a six-year imprisonment sentence. When he filed his motion in circuit court, he was still in prison. At the time of writing this brief it appears McDaniel only recently served out his sentence and began serving his conditional discharge. However, it does not appear as of the date of this brief that revocation proceedings been instituted against McDaniel's conditional discharge, nor has McDaniel been revoked from his conditional discharge.

McDaniel's underlying claim involves only the revocation proceedings for conditional discharges. However, McDaniel may never be subject to the revocation proceedings, and even if he were, he may never be revoked from his conditional discharge. McDaniel could serve out his conditional discharge without ever having an infraction. Or he could die, abscond from the country, or have any of myriad other circumstances occur in the interim. Furthermore, the revocation procedures in place when and if McDaniel is ever revoked may be substantially different than they currently are.

"Questions that may never arise or are purely advisory or hypothetical do not establish a justiciable controversy." *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005) (*citing Curry v. Coyne*, 992 S.W.2d 858, 860 (Ky. App. 1998)). "Because an unripe claim is not justiciable, the circuit court has no subject matter jurisdiction over it." *Ibid.*

Because McDaniel's motion concerned an unripe, non-justiciable, hypothetical issue, the trial court lacked subject matter jurisdiction to render an order. Two panels of the Court of Appeals have reached the same conclusion in separate cases regarding motions similar to McDaniel's. *Rothfuss v. Commonwealth*, 2015 WL 3826007 (Ky. App. 2015); *Gosnell v. Commonwealth*, 2014 WL 3721282 (Ky. App. 2014). McDaniel's panel should have reached the same result on his hypothetical issue. The Court of Appeals's opinion and the trial court's order should be vacated as the issue is not ripe for review.

II. Procedural posture of the Motion to Amend Sentence.

McDaniel first claims his motion should be reviewed as a CR 60.02 motion, not an RCr 11.42 motion as the Court of Appeals found. In spite of this assertion, McDaniel concedes his claim could be appropriately raised under RCr 11.42. Aplt's Brf. at 10. He also concedes his motion did not cite a procedural rule under which he was requesting relief. Aplt's Brf. at 7. Thus, his motion is an un-labeled and un-characterized motion. He argues his intention, which was first expressed in his Reply brief at the Court of Appeals, was to file a CR 60.02 motion, and claims the Court of Appeals should have discerned that alleged intention and reviewed his claim as such.

The problem with McDaniel's CR 60.02 claim is primarily thus – his motion requested RCr 11.42 relief. His motion raised an *Apprendi*/Due Process claim. This claim is most appropriately raised on direct appeal or in

RCr 11.42 *See Vaughn v. Commonwealth*, 258 S.W.3d 435 (Ky. App. 2008) (RCr 11.42 motion); *Meece v. Commonwealth*, 348 S.W.3d 627 (Ky. 2011) (direct appeal); *McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010) (direct appeal). *Compare*, *Bowling v. Commonwealth*, 163 S.W.3d 361, 377-378, fn 22 (Ky. 2005) (deciding *Apprendi* issue in CR 60.03 claim only because *Apprendi* rendered 10 years after Bowling's judgment and sentence). Because his motion raised an RCr 11.42 claim, the Court of Appeals properly reviewed it under that standard.

As this Court announced decades ago, Kentucky follows a non-haphazard and non-overlapping structure for attacking the final judgment in a criminal cases. "That structure is set out in the rules related to direct appeals, in RCr 11.42, and *thereafter* in CR 60.02." *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (emphasis in original). "CR 60.02 is not intended merely as an additional opportunity to raise [constitutional] defenses. It is for relief that is not available by direct appeal and not available under RCr 11.42." *Ibid.*

Gross is explicit that the post-conviction appeals order is (1) direct appeal; (2) RCr 11.42; (3) CR 60.02:

> We hold that the proper procedure for a defendant aggrieved by a judgment in a criminal case is to directly appeal that judgment, stating every ground of error which it is reasonable to expect that he or his counsel is aware of when the appeal is taken.

> Next, we hold that a defendant is *required* to avail himself of RCr 11.42 while in custody under sentence or on probation, parole or conditional discharge, as to any ground of which he is aware, or should be aware, during the period when this remedy is available to him.

Gross, 648 S.W.2d at 857 (emphasis added).

Because direct appeals and RCr 11.42 motions should be filed before CR 60.02 motions, a defendant is "foreclose[d] . . . from raising any questions under CR 60.02 which are 'issues that could reasonably have been presented' by RCr 11.42 proceedings." *Ibid.* If there were no order to the post-conviction appellate process, a defendant would not be barred from raising such claims in his CR 60.02 motion. *See Foley v. Commonwealth*, 425 S.W.3d 880, 884 (Ky. 2014) ("Similarly, CR 60.02 does not permit successive post-judgment motions, and the rule may be utilized only in extraordinary situations when relief is not available on direct appeal or under RCr 11.42.") (*citing McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997)).

Why close off issues in a third-line appellate attack if a defendant can choose to make it his first- or second-line appellate attack? Because "[t]he interrelationship between CR 60.02 and RCr 11.42 was carefully delineated in *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983)." *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). "A defendant who is in custody under sentence or on probation, parole or conditional discharge, is required to avail himself of RCr 11.42 as to any ground of which he is aware,

or should be aware, during the period when the remedy is available to him." *Ibid.*

A defendant cannot pick and choose an order in which to file his or her post-conviction claims in an effort to avoid procedural bars. The CR 60.02 motion is the final post-conviction motion and is reserved only for issues that could not be raised on direct appeal or in RCr 11.42. "In summary, CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." *McQueen*, 948 S.W.2d at 416. Thus, McDaniel's Motion to Amend Sentence, which contained an issue properly raised under RCr 11.42, should have been summarily denied as procedurally improper if it were reviewed as a CR 60.02 motion.

Furthermore, McDaniel asked the court only to vacate the conditional discharge due to the alleged constitutional violation. (TR 50). He did not claim any error so grievous as to void his entire judgment (in spite of his current assertion before this Court, *see* Aplt's brf. at 7). *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983) (". . . he must affirmatively allege facts which, if true, justify *vacating the judgment* and further allege special circumstances that justify CR 60.02 relief.") (emphasis added). It is highly doubtful that McDaniel, having served out his sentence, wants his judgment voided so he is returned to square one.

McDaniel's motion also did not state there were any extraordinary circumstances warranting CR 60.02 relief. McDaniel simply made a collateral claim of constitutional error and requested the "remov[al of] the conditional discharge portion of [the] sentence." (TR 86). McDaniel did not ask the court to render his entire judgment void, nor did he allege special circumstances to justify CR 60.02 relief.

Furthermore, though given two opportunities -- one of which was while he was represented by counsel -- McDaniel withheld his express intentions regarding his post-conviction rule choice. McDaniel did not claim he had filed a CR 60.02 motion when he filed his Motion to Amend Sentence, nor did he claim he had filed a CR 60.02 motion when he was represented by counsel and filed his Appellant's Brief at the Court of Appeals. In fact, his appellant's brief did not state his motion was raised under *any* post-conviction rule. McDaniel did not even claim the abuse-of-discretion standard of review applied on appeal, as it would in a CR 60.02 appeal. *Winstead v. Commonwealth*, 327 S.W.3d 479, 488 fn. 27 (Ky. 2010).

Instead, McDaniel claimed the issue was reviewed *de novo*, a standard of review for RCr 11.42 motions. *See Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008) ("On appeal, the reviewing court looks *de novo* at counsel's performance and any potential deficiency caused by counsel's performance.") (citations omitted).

Nor did McDaniel allege special, extraordinary circumstances existed, another requirement of CR 60.02 relief. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997) (". . . a CR 60.02 movant must demonstrate why he is entitled to this special, extraordinary relief."). Instead, McDaniel waited until his Reply brief at the Court of Appeals to first raise any allegation that his motion was a CR 60.02 motion.

That was the first time McDaniel made known his alleged intention to file his motion under CR 60.02. Prior to then, McDaniel's issue, his requested relief, and his standard of review all pointed to an RCr 11.42 motion. Accordingly, the Court of Appeals did not err by reviewing it as an RCr 11.42 motion.

Should this Court disagree and find McDaniel filed a CR 60.02 motion, the trial court's order should be affirmed because McDaniel admits this issue could have been raised in an RCr 11.42 motion. *Gross*, 648 S.W.2d at 857 (holding a defendant is "foreclose[d] . . . from raising any questions under CR 60.02 which are 'issues that could reasonably have been presented' by RCr 11.42 proceedings.").

III. McDaniel was not denied a "Fair Warning."

McDaniel's substantive argument has been a moving target. At the trial court he claimed the revocation procedures for conditional discharges violated *Apprendi* and the Double Jeopardy Clause. At the Court of Appeals he claimed a "Fair Warning" violation under the Due Process clause. (Ct. of

App. Appellant's Brf. at 10). Now he claims a violation of both "Fair Warning" and the Ex Post Facto Clause. (Aplt's Brf. at 19).

A. Two cans of worms.

McDaniel's claim on discretionary review is so far removed from the trial court claim that it should be denied. A defendant cannot "'feed one can of worms to the trial judge and another to the appellate court.'" *Grundy v. Commonwealth*, 25 S.W.3d 76, 84 (Ky. 2000) (quoting *Kennedy v. Commonwealth*, 544 S.W.2d 219 (1977)). Here, the trial court ruled on McDaniel's *Apprendi* and Double Jeopardy claims. McDaniel has abandoned – not evolved – the claims presented to the trial court. Having fed one can of worms to the trial court and another to the appellate courts, McDaniel's appeal should be summarily denied.

B. Fair Warning claim.

Alternatively, McDaniel's latest claim fails under the law. "A 'fair warning' violation occurs '[w]hen a[n] . . . unforseeable state-court [sic] construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect [being] to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime.'" *Walker v. Commonwealth*, 127 S.W.3d 596, 603 (Ky. 2004) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354-55 (1964) (alterations in original)). In *Bouie* the state supreme court interpreted the trespass statute, which explicitly prohibited only *entry* onto lands of others,

to also prohibit *remaining* on the premises of another after being told to leave. 378 U.S. 349-350. Prior to this judicial interpretation of the statute, two African-American men had conducted a sit-in at a restaurant after being told to leave. *Id.* at 348. The United States Supreme Court found the men were not given "fair warning" that their past actions of *remaining* in the restaurant would constitute a crime under the statute that only criminalized *entry*. Thus, the men were denied due process of law because they were not given fair warning that their past acts were criminal.

McDaniel's "fair warning" claim fails under *Bouie*. "'[T]he touchstone [for determining fair warning] is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.'" *Tharp v. Commonwealth*, 40 S.W.3d 356, 362 (Ky. 2000) (quoting *United States v. Lanier*, 520 U.S. 259, 267 (1997)). At the time McDaniel committed his sex crimes, he had fair warning that his acts constituted a crime and would be subject to a five-year conditional discharge. *Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010) did not change the fact that sex crimes are subject to a five-year conditional discharge that is supervised by Probation and Parole under the conditions set by the executive branch.[1] The only change was a procedural change in how revocation proceedings would occur. This procedural change does not alter

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[1] Because Fair Warning claims only concern state-court changes to the law, the legislative changes to the statute and regulations are discussed below in the proper *Ex Post Facto* Clause context.

the fact that McDaniel had fair warning about the criminal penalty of his actions, the length of sentence he would receive, the length of the conditional discharge, or the terms of that conditional discharge. Thus, McDaniel had a "fair warning" that his sex crimes would be subject to an additional five-year post-parole supervision. His fair warning claim must fail.

C. ***Ex Post Facto* claim.**

A "fair warning" violation occurs under the Due Process Clause when a judicial interpretation of a statute increases what past acts are subject to criminal penalties. In contrast, when the state legislature changes a statute so as to increase criminal punishment for past acts, the legislative changes may violate the *Ex Post Facto* clause of the United States Constitution, Article I, Section 10, Clause 1. The *Bouie* Court noted the difference between actions arising under the Due Process Clause and the *Ex Post Facto* Clause:

> If a state legislature is barred by the Ex Post Facto Clause from passing such a law [that makes criminal an action done before the passing of the law, or that aggravates a crime or makes it greater than it was when committed], it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

378 U.S. at 353-354. *See also Rogers v. Tennessee*, 532 U.S. 451, 460 (2000) ("The *Ex Post Facto* Clause, by its own terms, does not apply to courts."). Under the *Ex Post Facto* Clause, one must prove the statutory or regulatory changes created a "sufficient risk of increasing the measure of punishment attached to the covered crimes." *California Dept. of Corrections v. Morales*, 514 U.S. 499, 509 (1995). McDaniel cannot make such a claim.

First, McDaniel is again feeding one can of worms to the trial court and another to this court by raising an *Ex Post Facto* claim here and a Due Process/*Apprendi* claim below. (TR 82-87). The trial court did not rule on an *Ex Post Facto* claim as it was not before the trial court. (TR 98). His novel claim should be dismissed.

Second, McDaniel claim fails substantively. KRS 532.043 provides that following release from parole or "incarceration upon expiration of sentence," certain sex offenders are subject to an additional five-years of conditional discharge. Effective March 3, 2011, KRS 532.043 was amended *in toto* to rename "conditional discharge" to "postincarceration supervision." Additionally, KRS 532.043(4)-(5) were amended as follows:

> (4) Persons under *postincarceration supervision* ~~conditional discharge~~ pursuant to this section shall be subject to the supervision of the Division of Probation and Parole *and under the authority of the Parole Board.*
>
> (5) If a person violates a provision specified in subsection (3) of this section, the violation shall be reported in writing *by the Division of Probation and Parole. Notice of the violation shall be sent to the Parole Board to determine whether probable cause exists* ~~to the Commonwealth's attorney in the county of conviction. The Commonwealth's attorney may petition the court~~ to revoke the defendant's *postincarceration supervision* ~~conditional discharge~~ and reincarcerate the defendant as set forth in KRS 532.060.

(italics indicate additions, strike-throughs indicate deletions).

These changes were enacted in response to this Court's opinion in *Jones v. Commonwealth*, 319 S.W.3d 295 (Ky. 2010). In *Jones*, two defendants serving KRS 532.043 conditional releases challenged the constitutionality of the statute under the separation of powers doctrine. *Id.* at 295-296. A conditional discharge is typically an unsupervised release granted by the trial court at sentencing. *Id.* at 298. The conditional discharge as used in KRS 532.043 operated differently, however, establishing a "statutory scheme [that] is more akin to parole or an extension of parole." *Ibid.*

> With parole, the Parole Board (executive branch) sets the conditions of release, as well as the terms of supervision, *after* a prisoner has been sentenced by the court and has begun serving his or her sentence. Parole suspends the execution of a sentence.
>
> "Parole recognizes those justifications [for incarceration] existed at sentencing and there now exists a change of circumstances or a rehabilitation of a prisoner." "[T]he power to grant parole is a purely executive function."
>
> Upon breach of a condition of parole, the parole officer seeks revocation. An administrative hearing is held before the Parole Board. Appeals are then made to the Circuit Court, as with other executive, administrative appeals.

Jones, 319 S.W.3d at 298 (footnotes omitted, paragraph breaks added for readability).

The statute provided the executive branch to set the conditions of the conditional discharge and to supervise the conditional discharge. *Ibid. See also* KRS 532.043(3) and (4). The problematic subsection of the statute, KRS

532.043(5), "impose[d] upon the judiciary the duty to enforce conditions set by the executive branch." *Jones*, 319 S.W.3d at 299. "This statutory mixture of the roles of the judiciary within the role of the executive branch is fatal to the legislative scheme." *Ibid.* Subsection 5 thus "runs afoul of the separation of powers doctrine when *revocation* is the responsibility of the judiciary." *Jones*, 319 S.W.3d at 299-300 (emphasis in original). This holding was limited only to Subsection 5:

> Finally, we note that our ruling is limited to KRS 532.043(5). Only the revocation procedure established by this subsection is unconstitutional. Because subsection (5) is severable from the remainder of the statute, the statute's other provisions remain in force.

Id. at 300 (footnote omitted). Thus the other subsections remained in effect and required certain sexual offenses to be: subject to a five-year period of postincarceration supervision; subject during the postincarceration supervision to all orders specified by the Department of Corrections; and subject to the supervision of Probation and Parole during the postincarceration supervision.

The General Assembly then amended the statute, as shown above, to alter the revocation procedure. Now revocation of the postincarceration supervision period is performed by the Parole Board instead of the circuit court.

i. Not an *Ex Post Facto* claim.

Initially, McDaniel's claim must fail because amendments to KRS 532.043(5) are not *ex post facto* laws. McDaniel is subject to the same five-year conditional discharge/post-incarceration supervision that he was subject to when he committed his crimes. The only change is a procedural change in how revocation proceedings are conducted:

> The 2011 amendment to KRS 532.043(5) merely established a new procedure for adjudicating the revocation of conditional discharge. It did not create a new crime or enhance an existing crime, it did not in itself enhance the penalty for an existing crime, and it did not in any way alter the rules of evidence in regards to the offense charged.

Rider v. Commonwealth, 460 S.W.3d 909, 911 (Ky. App. 2014).

The law has provided for a five-year conditional discharge from the day that McDaniel committed his sexual crimes. That conditional discharge was always subject to revocation. Nothing has changed about the length of the sentence or the fact that it is subject to revocation. Thus, the legislature has not "retroactively alter[ed] the definition of crimes or increase[d] the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990).

Only the procedures for revocation have changed inasmuch as one is now before an ALJ and the Parole Board rather than a circuit judge. This procedural change is not an *Ex Post Facto* violation. McDaniel's claim should be denied.

ii. Not an *Ex Post Facto* violation.

In addition to not being an *Ex Post Facto* claim, McDaniel's claim does not demonstrate an *Ex Post Facto* violation. The only way in which a procedural change in the law could violate the *Ex Post Facto* Clause of the United States Constitution is if it "inflicts a greater punishment, than the law annexed to the crime, when committed[.]" *Calder v. Bull*, 3 U.S. 386, 390, 3 Dall. 386 (1798). When the "retrospective change results in increased punishment[,]" either by "'alter[ing] the definition of criminal conduct or increas[ing] the penalty by which a crime is punishable[,]'" the *Ex Post Facto* Clause may be violated. *Martin v. Chandler*, 122 S.W.3d 540, 547 (Ky. 2003) (quoting *California Dept. of Corrections v. Morales*, 514 U.S. 499, 506 n.3 (1995)).

Ferreting out the metes and bounds of "increased punishment" has required years of case law by the United States Supreme Court. Analysis of three seminal cases deciding alleged *Ex Post Facto* violations of laws altering the terms of discretionary parole or early release demonstrate the changes to Subsection (5) are not constitutionally infirm.

In *Weaver v. Graham*, 450 U.S. 24 (1981), the Florida legislature changed good-time credit laws to grant fewer days of credit each month for all inmates. *Id.* at 26-27. The change in the law occurred both after Weaver had committed murder and after he had been sentenced for second-degree murder. *Id.* at 25-26. Because the parole board applied the new calculation of

good-time credits to Weaver, Weaver was required to serve two additional years, or approximately 14 percent of his original 15-year sentence. *Id.* at 27. Weaver claimed the change in law violated the *Ex Post Facto* Clause.

The United States Supreme Court agreed. In analyzing its past decisions, the Court noted "two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective . . ., and it must disadvantage the offender affected by it." *Id.* at 29. Applying this standard the Court found the change in law "substantially alter[ed] the consequences attached to a crime already completed, and therefore changes 'the quantum of punishment.'" *Id.* at 33 (quoting *Dobbert v. Florida*, 432 U.S. 282, 293-294 (1977)). Inmates who followed prison rules received fewer monthly good-time credits under the new statute. "By definition, this reduction in gain-time accumulation lengthens the period that someone in petitioner's position must spend in prison." *Id.* at 33. Thus, an *Ex Post Facto* violation occurred.

In subsequent decisions, *Weaver*'s holding was narrowed significantly. *See Martin v. Chandler*, 122 S.W.3d 540, 547 (Ky. 2003) ("The United States Supreme Court, however, has subsequently identified the 'disadvantaged' language as dicta and has framed the appropriate inquiry as whether a retrospective change results in increased punishment[.]"). McDaniel ignores the fact that the "disadvantaged" language is mere dicta, instead proffering it

as the standard for characterizing a law as an *Ex Post Facto* violation. Aplt's Brf. at 20. As is shown, the standard is much higher.

In *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995), parole statutes in effect when Morales was convicted of multiple murders provided that his sentence be reviewed annually by the parole board. While in prison, however, the statutes were changed to permit the parole board to defer Morales for up to three years "if it found no reasonable probability that respondent would be deemed suitable for parole in the interim period." *Id.* at 502-503, 507. At his 1989 parole hearing, Morales was deferred until 1992. *Id.* at 503.

Morales claimed this procedural change in his parole hearings violated the *Ex Post Facto* Clause. *Id.* at 504. The Court noted that unlike the law in *Weaver*, which "had the purpose and effect of enhancing the range of available prison terms," the California statute in *Morales* relieved the parole board from costly and time-consuming parole hearings for prisoners "who have no reasonable chance of being released." *Id.* at 507. The California statute did not change the sentencing range of the applicable crimes, but "simply 'alter[ed] the method to be followed' in fixing a parole release date under identical substantive standards." *Id.* at 508. Thus, it did not violate the *Ex Post Facto* Clause.

The Court rejected the "expansive view" that any statute that has a "conceivable risk of affecting a prisoner's punishment" violates the *Ex Post*

Facto Clause. *Ibid.* "Respondent's approach would require that we invalidate any of a number of minor (and perhaps inevitable) mechanical changes that might produce some remote risk of impact on a prisoner's expected term of confinement." *Ibid.* The Court noted this approach would result in judicial "micromanagement of an endless array of legislative adjustments to parole[.]" *Ibid.* It held that it is a matter of "degree" whether a legislative adjustment sufficiently transgresses the constitutional prohibition. *Id.* at 509. That degree cannot be defined by a "single 'formula[.]'" *Ibid.* However, when:

> [t]he amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the *Ex Post Facto* clause.

Ibid.

This holding was expanded in *Garner v. Jones*, 529 U.S. 244 (2000). There, a Georgia law in place when Jones was sentenced required that all inmates serving life sentences first see the parole board after seven years, and if denied parole, every three years thereafter. *Id.* at 247. The law was subsequently changed to permit the parole board to order reconsideration up to eight years later instead of three. *Ibid.* In Jones's case, the parole board denied parole after seven years and set Jones's next parole hearing date eight years in the future. *Ibid.* However, because the United States Court of Appeals for the Eleventh Circuit in *Akins v. Snow*, 922 F.2d 1558 (1991) found an *Ex Post Facto* violation in a similar case, the parole board reinstated

the three-year parole reconsideration in Jones's case. *Ibid.* Jones was denied parole twice under the three-year scheme. *Id.* at 247-248.

Then in light of the *Morales* opinion, which rejected the *Akins* rationale, the parole board reinstated the eight-year reconsideration period. *Id.* at 248. Jones then brought a 42 U.S.C. § 1983 action against the parole board claiming an *Ex Post Facto* violation. *Ibid.* The District Court entered summary judgment for the parole board, finding the statute only relieved the parole board of the necessity of holding parole hearings for prisoners who have no reasonable chance of being released, permitted parolees to petition the parole board for a new hearing due to a change in circumstances, and created "only the most speculative and attenuated possibility" of increasing a prisoner's punishment. *Ibid.*

The Court of Appeals reversed, finding a greater number of prisoners were affected by the new law than were affected in *Morales*, and that "'[m]uch can happen in the course of eight years to affect the determination than an inmate would be suitable for parole.'" *Id.* at 249 (quoting *Garner v. Jones*, 164 F.3d 589, 595 (11th Cir. 1999)). The United States Supreme Court granted *certiorari* and reversed.

The Court's analysis began by "emphasizing that not every retroactive procedural change creating a risk or affecting an inmate's terms or conditions of confinement is prohibited." *Garner*, 529 U.S. at 250. "The controlling inquiry . . . [is] whether retroactive application of the change in . . . law

created 'a sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Ibid.* (quoting *Morales*, 514 U.S. at 509).

Here, the Georgia parole law did not sufficiently increase the measure of punishment to be facially dispositive of an *Ex Post Facto* violation. Even though the Georgia law permitted extensions of parole reconsideration by five years (instead of two), covered all prisoners serving life sentences (instead of just multiple murderers), and afforded inmates fewer procedural safeguards (i.e., no formal hearings in which counsel can be present), the Court reiterated, "The question is whether the amended Georgia Rule creates a significant risk of prolonging respondent's incarceration." *Garner*, 529 U.S. at 251. "The requisite risk is not inherent in the framework of [the amended Georgia rule], and it has not otherwise been demonstrated on the record." *Ibid.*

The Court noted "[t]he States must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release." *Garner*, 529 U.S. at 252.

In light of this case law, no *Ex Post Facto* Clause violation occurred when the General Assembly amended KRS 532.043, and the Department of Corrections promulgated regulations consistent therewith. McDaniel principally complains that because he "may" elect to waive his right to an attorney during a postincarceration supervision revocation proceeding, and because some of the procedures are different under the new statute and

regulations, he may be re-committed if he violates the terms of his postincarceration supervision. Aplt's Brf. at 16. But he likely would have been re-committed if he violated the terms of his postincarceration supervision under the former procedure. His claim is too speculative to show to show a "significant risk" of inmates having their incarceration prolonged. *Morales, supra*; *Garner, supra.*

Unlike *Weaver* where all inmates automatically received less good-time credit and were thus automatically subject to a longer imprisonment sentence and a "significant risk" of injury was apparent, the instant case aligns with *Morales* and *Garner*, where parole procedures changed but did not automatically subject any prisoner to a longer sentence.

The instant statutory and regulatory changes only affect a small subset of an even smaller subset of inmates – only those sex offenders who violate or are accused of violating the terms of their postincarceration supervision. The changes do not automatically subject any offender to a longer imprisonment sentence, as the good-time credit changes did in *Weaver*. The changes still provide for revocation proceedings during which offenders have the right to request and have counsel present. *See* 501 KAR 1:070 § 1(11) ("Any party appearing before an administrative law judge of the Kentucky Parole Board may be represented by counsel if he so desires.") (Appendix 1); KYPB 30-01 (Appendix 2); CPP 27-19-01 (Appendix 3); CPP 27-30-02(II)(H)(6) (violations of sex offender postincarceration supervision

governed by CPP 27-19-01). Offenders still receive the full "minimal due process rights" required during a parole revocation hearing. *Gamble v. Commonwealth*, 293 S.W.3d 406, 413 (Ky. App. 2009). *See also Morrissey v. Brewer*, 408 U.S. 471, 488 (1972). And in some respects they receive more procedural rights under the new regulations than they received in circuit court.

For example, instead of one revocation hearing before a single judge, the offender now receives a preliminary revocation hearing before an ALJ where witnesses are sworn under oath and evidence is presented, and, if probable cause is shown at that hearing and the case is referred to the Parole Board, the majority of the Parole Board must agree with the ALJ's findings and issue a warrant and bring the offender before the Parole Board for a "final sex offender postincarceration supervision revocation hearing." 501 KAR 1:070 §1(1)-(6). At that final hearing the defendant may request to present additional evidence and may receive a special hearing. *Id.* at §3. The Parole Board then votes whether to revoke, and if it decides to revoke, the defendant may petition the Board for reconsideration of the decision. *Id.* at §4. These procedures, though slightly different than a revocation hearing in circuit court, do not facially demonstrate that more prisoners will serve prolonged incarceration than they would have under the former procedure.

To constitute an *Ex Post Facto* law, "the court must first determine whether a change in law or regulation creates a significant risk of increased

punishment for the inmate." *Stewart v. Commonwealth*, 153 S.W.3d 789, 793 (Ky. 2005) (citing *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995)). McDaniel cannot make this *prima facie* showing. Because the change does not show an increased risk on its face, the defendant must demonstrate "'that its retroactive application will result in a longer period of incarceration than under the earlier rule.'" *Ibid.*

As shown above, the procedural changes are minimal. A defendant still has a right to counsel, still has a right to a hearing, still has a right to present evidence and cross-examine witnesses, and still has a right to detached and neutral arbiter. These changes are to familiar -- not unfamiliar -- territory, as the revocation procedures for post-incarceration supervision closely mirror those for parole revocation. *Compare* 501 KAR 1:040, *with* 501 KAR 1:070. These minimal procedural changes do not demonstrate that more defendants are at a significant risk of increased punishment, a requisite showing for an *Ex Post Facto* finding. *Stewart, supra.*

Indeed, McDaniel has been aware that he has to serve a five-year conditional discharge from the day he entered a guilty plea. He was aware he was subject to revocation of that conditional discharge. He was aware he would go to prison and then be released either on parole first and conditional discharge second, or serve out his prison sentence and be released on conditional discharge. Nothing about his punishment has increased.

Other than make a bare assertion that his punishment may increase, McDaniel can prove no more. He readily admits he cannot provide any statistics or facts to prove his claim. (Aplt's Brf. at 21, fn. 3) ("it is an impossible task to collate the relevant statistics."). He only relies upon extreme hypotheticals – "speeding tickets" forming the basis of a revocation proceeding (Aplt's Brf. at 13) -- and rampant speculation to support his claims. Neither suffice as hard evidence of a significant risk of increased punishment.

As the United States Supreme Court cautioned, courts must avoid the "'micromanagement of an endless array of legislative adjustments to parole and sentencing procedures.'" *Garner*, 529 U.S. at 252 (quoting *Morales*, 514 U.S. at 508). "The States must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release." *Garner*, 529 U.S. at 252.

McDaniel's novel claim, raised for the first time on appeal, fails for multiple reasons. The trial court's order denying McDaniel's motion should be affirmed.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Commonwealth respectfully requests the Court AFFIRM the trial court's order denying McDaniel's post-conviction motion.

Respectfully submitted,

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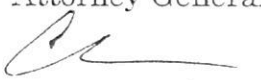

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